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50738

FRANK MUNDO and MARIE MUNDO, Plaintiffs-Appellees, vs. LEONARD DeGRAZIO, FRANK ORIENTI and ROSE ORIENTI, Defendants-Appellants.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE KLUCZYNSKI DELIVERED THE OPINION OF THE COURT:

This is an appeal by defendants from a declaratory judgment which found that the plaintiffs, Frank and Marie Mundo, were exclusively entitled to all of the rights under a certain lease dated April 19, 1960, between the defendant, Leonard DeGrazio, as lessor, and Frank and Marie Mundo and Frank and Rose Orienti, as lessees. Defendants further appeal from orders of the court finding that plaintiffs are the sole owners of the fixtures and furniture of the restaurant, the subject matter of the lease, and of the business, and that the plaintiffs are entitled to recover the sum of $7,017.65 from DeGrazio for loans made to him and monies expended on his behalf.

Defendant, Leonard DeGrazio, and his wife, Millie, owned and operated a restaurant at 5359 Madison Street, Chicago, Illinois. In November of 1959 Millie died and DeGrazio spoke to his son-in-law Frank Mundo, about coming into business with him. Frank agreed "to help out" at the restaurant and did so until April of 1960 when DeGrazio executed a lease of the restaurant to Frank and his wife, Marie, and to his other son-in-law, Frank Orienti, and his wife, Rose, as lessees. Plaintiff Marie Mundo and defendant Rose Orienti are daughters of DeGrazio. The lease provided that DeGrazio was to receive a $100. a week rental and was executed contemporaneously with a contract which read:

> "For and in consideration of love and affection for my two daughters, Rose Orienti and Marie Mundo, I hereby convey a one half interest in the restaurant business and tavern only, equally to each of them, they to operate, control, manage and pay all the current bills due and owing on said establishment, and they to carry the necessary insurance to protect my liability, if any."

Plaintiffs signed the lease and contract with the understanding that the Orienti's would form a partnership with them to manage the business. Thereafter, the plaintiffs operated the business but the Orienti's participation was limited to helping out on selected weekends and paying certain small bills of the business. A few months later the Orienti's discontinued their efforts in the enterprise completely.

During the interim between November of 1959 when DeGrazio first spoke to Frank Mundo about coming into the business and April of 1960 when he executed the lease and contract, DeGrazio contracted for the remodeling of the restaurant and the purchase of equipment for it. Partial and full payments were made on these obligations by checks drawn by Frank Mundo against DeGrazio's account and signed by DeGrazio. After the lease was executed the Mundo's made payments on various bills of the business as they came due, together with payments on obligations owing at the date of the lease which had been defaulted on by DeGrazio.

On June 15, 1961, plaintiffs brought an action at law for a declaratory judgment to determine their rights in the restaurant property and business, and to determine the liability of DeGrazio to them for money they paid on obligations of the business and money allegedly advanced to him for personal expenses.

Pursuant to this suit the trial court entered an order on September 20, 1962, declaring that the Mundo's were sole owners of

the fixtures and other assets of the business and were exclusively entitled to the rights granted under the lease of April, 1960. The court referred the other issues raised by plaintiffs for hearing by a master in chancery. At this hearing the master found that DeGrazio made a loan from the American National Bank and Trust Co. of Chicago on March 4, 1960, for $3,449.39 to improve the real estate; that plaintiffs subsequently paid said bank, as of June, 1963, the sum of $3,266.65 on the loan, which payments materially benefited DeGrazio as owner of the real estate and that he was therefore liable to repay plaintiffs. The master further found that plaintiffs made payments totaling $3,261.10 for fixtures, furnishings and equipment furnished to the store premises; that the defendants, Frank and Rose Orienti, with the exception of $150. paid on May 2, 1960, to Gold Bros. did not contribute any money towards the payment of the above items, and that therefore the Orienti's had no interest in the fixtures and other assets of the business. The master also found that plaintiffs had made personal loans in the amount of $4000.00 to DeGrazio and that he was liable to plaintiffs for the repayment of those loans.

The master's findings and recommendations were adopted by the trial court and incorporated into its order of May 18, 1965, which affirmed its earlier finding as to the ownership of the fixtures and assets of the business and, in addition, awarded the plaintiffs a money judgment of $7,017.65 against DeGrazio, representing the money paid by plaintiffs on the loan by American National Bank, $3,226.65, and the money advanced by plaintiffs to DeGrazio for personal expenditures, $4,000., less a credit to DeGrazio for certain personal checks he wrote payable

to Frank Mundo.

The defendants, DeGrazio and the Orientis, appeal from this latter order of the court contending that they have certain rights under the lease "and the court cannot rewrite a clear and unambiguous lease" excluding them from rights under the lease.

Plaintiffs urge that this contention is not reviewable by this court because the issue of the Orientis' rights under the lease and their ownership of any of the business assets was settled by the court's order of September 20, 1962, which order was final and never appealed from within the appropriate statutory period. On the other hand, defendants contend that the order of September 20, 1962 was merely interlocutory; that the rights between the parties to the lease were not finally settled until the court's order of May 18, 1965; that notice of appeal was properly filed with respect to that order, and that all facets of that order are reviewable herein.

The trial court's order in question determined that plaintiffs were sole owners of the business and sole lessees under the lease, and this determination, in our opinion, is

distinct from, and has slight relevance to, the issue of DeGrazio's liability to plaintiffs. Furthermore, this order was never changed in any respect by any subsequent orders of the court although it was incorporated in the court's order of May 18, 1965. Hence, the 1962 order was a final judgment of the parties' rights under the lease and since no appeal was taken from that judgment within the appropriate statutory period, defendants may not now obtain review of that judgment.

Assuming, arguendo, that the issue of the parties' rights under the lease is reviewable herein, we find no basis for overturning the lower court's decision on that issue. Paragraph two of plaintiffs' complaint alleged that:

> "Though the lease in this particular case runs also to Frank Orienti and Rose Orienti, they were made a Lessee on the assumption that they would form a partnership with Frank Mundo and Marie Mundo, in the operation of said business and that Frank Orienti and Rose Orienti never entered into a partnership; never operated, controlled or managed to pay all the current bills that were due and owing on said establishment; that they never paid any monies whatsoever, and refused to have anything to do with the business whatsoever, so that the business with all the attendant expenses was run and operated by the Plaintiffs herein, Frank Mundo and Marie Mundo."

Defendants' answer stated that:

> "Defendants admit the allegations in Paragraph 2 of the Complaint, and in further answer to said paragraph, Frank Orienti and Rose Orienti state that at all times they were ready, willing, and able to enter into said partnership and that they put in some time and effort in and about the best interest of said partnership; and that the plaintiffs refused and would not permit them to take any further interest or do any work in and about the furtherance of the said partnership."

By their answer, which is somewhat contradictory, defendants

have, at the least, admitted that their rights under the lease were conditioned upon their entering into and maintaining a partnership with plaintiffs. With regard to the defendants' willingness to maintain such partnership the record discloses that Rose Orienti testified on cross-examination that she did not want any part of the business as "the business was not big enough to support two families." Also, Frank Orienti testified that he told Frank Mundo that if he wanted to install an air conditioner that he (Orienti) would not have anything to do with it and would leave. Thus, from the evidence it is clear that the defendants voluntarily withdrew from the business venture, thereby failing to perform an admitted condition of their contract and, therefore, forfeiting any and all rights accruing to them under the lease.

Defendants further contend that plaintiffs had an existent well recognized cause of action against DeGrazio at law to recover a money judgment, and that this existent cause of action is a bar to an action for declaratory judgment.

The facts show that plaintiffs had two causes of action against the defendants; one was for a declaratory judgment as to the lease and partnership and the other was for an accounting and money judgment. Since both claims arose out of the same series of transactions, plaintiffs, under the provisions of Section 44 of the Civil Procedure Act, were entitled to consolidate their actions against the defendants. If the defendants disapproved of such consolidation, their proper remedy was to petition the trial court for a severance of the actions. Since the defendants failed to make such request or to appeal the initial declaratory judgment of the court, their right to raise this issue here for the first time is questionable. But in any event the Declaratory

Judgment Act, Sec. 57.1, ch. 110, Ill. Rev. Stat. 1965, provides that:

> "(2) Subject to rules, declarations of rights, as herein provided for, may be obtained by means of a pleading seeking that relief alone, or as incident to or part of a complaint, counterclaim or other pleading seeking other relief as well...."

Hence, it is clear that a court by express statutory authorization may grant further or additional relief incidental to a declaratory judgment. This conclusion was noted by the court in Andrews v. City of Springfield, 56 Ill. App.2d 201, 205 N.E.2d 798 (1965), wherein it remarked, p. 216:

> "Illinois cases have recognized that the granting of consequential relief in the original declaratory judgment is not an abuse of sound judicial discretion."

We therefore find no merit in defendants' contention.

The defendants next contend that the debt owing to the American National Bank in the amount of $3,449.39, on which plaintiffs paid $3,266.65, was for trade fixtures used in connection with the business, and that such indebtedness was assumed by plaintiffs pursuant to the terms of the lease and contract signed by them.

The master, in construing the contract between the parties, found that the provision for the payment of "all the current bills due and owing" imposed liability upon the plaintiffs-signees for pre-existing bills of the business. Accordingly, all of plaintiffs' claims against DeGrazio for payments made by them on obligations of the business were denied with the exception of the amount paid by plaintiffs on the loan from American National Bank. This claim was allowed because the master found, apparently on the basis of a letter written by an

officer of the bank, that the loan was for the improvement of realty on which the leased premises stood, thereby benefiting the owner of the realty, DeGrazio, who therefore became liable for the repayment of the loan.

Defendants assert that the letter written by an officer of the bank specifying the nature of the loan is hearsay evidence and thus incompetent to establish the purpose for which the borrowed funds were used. The validity of this assertion is irrelevant, however, because both parties have admitted, in the course of the litigation, that the borrowed funds were used to purchase and install a combination heater and air conditioner in the restaurant. Hence, the question which is determinative of the parties' liability on the loan is whether the heater and air conditioner is a trade fixture, and therefore a liability of plaintiffs, as operators of the business, or a part of the realty, and thus a liability of DeGrazio, as owner of the realty.

The heater and air conditioner was ordered by DeGrazio but paid for by plaintiffs at a cost of $3,266.65. There is no evidence in the record as to how the apparatus was attached to the building, although its large cost suggests that it was not portable in nature but built into the walls of the restaurant, nor is there any evidence of an agreement between the parties concerning their treatment of the apparatus. However, in view of the probable permanent character of the apparatus inferred from its large cost, we think the apparatus is properly considered a part of the realty for which DeGrazio, as owner thereof, is liable.

We find support for this conclusion in the case of In Re Theodore A. Kochs Co., 120 F.2d 603 (1941), wherein the court

held that where articles are bought and installed, which are indispensable to the business and, particularly, where they are bought by the owner of the property, the presumption is that they are fixtures, and form a part of the realty. See also Joyner v. Mitchell, 267 Ill. App. 427 (1932). Thus, we hold the trial court correctly allowed the plaintiffs reimbursement for the money paid on the heater and air conditioner.

Defendants further contend that the master improperly admitted hearsay evidence, consisting of various receipts and letters and a written promise to pay prepared and signed by Frank Mundo, and that its admission constitutes reversible error.

Defendants complain of certain receipts which were introduced into evidence by plaintiffs to show that they had paid a certain amount of money on the various obligations of the business for which they were seeking reimbursement. We find that no reversible error was committed in their admission even if the receipts were, as defendants claim, hearsay evidence since the master disallowed every and all claims of plaintiffs based on these receipts and no prejudice could therefore have accrued to defendants. Defendants also complain of a letter written by American National Bank stating that Frank Mundo had paid $3,266.65 on the indebtedness of DeGrazio. Assuming this letter was erroneously admitted, it is immaterial for purposes of reversal since DeGrazio expressly admitted that Frank Mundo had paid that amount. Finally, defendants complain of a written promise to pay, executed by Frank Mundo in the favor of one McErlean for a personal loan and introduced into evidence to establish the fact of the loan. Again, it is irrelevant if the note's admission was improper since the purpose for which it was

admitted, to prove up the existence of the loan, was corroborated by the testimony of McErlean, Frank and Marie Mundo and another witness, Dan Educate.

Lastly, defendants charge that "the finding of the master approved by the court that plaintiffs made loans totaling $4,000.00 to the defendant, DeGrazio, is not supported by and is contrary to and against the manifest weight of the evidence."

Marie Mundo testified that her husband, Frank, in March of 1959, gave her father, Leonard, his $1,000.00 policeman's pension check and $500.00 cash, which he had borrowed from one William McErlean, and that they had also, at that time, given him an additional $1500.00 in cash, making a total loan of $3,000.00. She further testified that in September of 1959, she and Frank loaned her father $1,500.00 in cash; that this money was given to her father in the presence of her mother, and that this money as well as the prior advancements was never repaid. Her testimony was corroborated in all respects by her husband, Frank Mundo.

William McErlean testified that he visited the Mundos in March of 1959; that at that time he loaned Frank Mundo $500.00, and that he saw Frank give his father-in-law $1,000.00 in cash in addition to the $500.00.

Dan Educate, a witness for plaintiffs, testified that he was at the Mundo home around Labor Day, 1959; that he saw Frank Mundo take money from a drawer and give it to his father-in-law, and that Frank's wife and Mrs. DeGrazio were present in the room at the time.

Defendant, Leonard DeGrazio, admitted receiving the pension check for $1,000.00 but testified that he used the proceeds from

the check to pay for certain expenses of the business. He denied that plaintiffs had ever loaned him any money other than the pension check and he, himself, introduced into evidence personal checks totaling $249.00 which he had written payable to Frank Mundo.

Upon the foregoing testimony and other evidence the master found that plaintiffs had made personal loans to DeGrazio totaling $4,000.00; that these loans had never been paid back, and that DeGrazio was liable for their repayment, less a credit for the $249.00 he had given to plaintiffs. On review it is well settled that we may not upset these findings unless they are against the manifest weight of the evidence. Brown v. Zimmerman, 18 Ill.2d 94, 163 N.E.2d 518 (1960). Herein, the testimony of the plaintiffs is supported by the testimony of two pecuniarily disinterested witnesses, McErlean and Educate, while defendant DeGrazio's contradictory testimony is unsupported by independent testimony. Hence, in our opinion, there is ample evidence in the record to support the master's findings which were approved by the trial court and, therefore, the order of the trial court is affirmed.

JUDGMENT AFFIRMED.

MURPHY and BURMAN, JJ., concur.

Abstract only.

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50314

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALBERT LAVERN JOHNSON, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction for the crime of arson, after a bench trial, with sentence in the Illinois State Penitentiary for a period of from two to five years.

At the trial Clytie Holloway, a witness for the State, testified that her son, Andrew Holloway, was fourteen years old and in eighth grade.

Andrew Holloway testified that on February 26, 1964, he was in the vicinity of 1415 North Clybourn Avenue in Chicago; that he was accompanied by Eddie Griffin, a boy about twelve years old; that it was about 8:30 P.M.; that he saw two men throw a lighted can under the steps of the building located at the aforesaid address; that the building contained a tavern; that he was about 125 feet away from the two men; that he did not know which man lit the can; that he saw two men come from the back of the tavern "like they didn't do nothing"; that he identified one of the two men as defendant; that he had seen defendant before and had known of him as "Breathtaker"; that defendant was the man who threw the can; that Eddie asked, "Why did you light the fire"; that the two men did not answer and ran south; that the two boys put the fire out; that firemen came and poured water on the can; and that he saw the top of the house, above the tavern, burning.

On cross-examination, Andrew Holloway testified that both men wore brown clothing; that defendant was called "Breathtaker" because he drank a lot and smelled; that he had seen him on about four prior occasions in the neighborhood; and that in a statement to the police, he had said defendant was <u>colored</u>. (Emphasis supplied.)

Eddie Griffin testified that on February 26, 1964, he was with Andrew Holloway; that it was about 8:45 P.M.; that they saw a can on fire; that a man in the building yelled "put that fire out"; that he saw two men light a fire and run around the building; and that when the men were asked why they lit the fire, defendant "cussed" at him. He identified defendant in the courtroom and described defendant's clothing worn at the scene as brown with a checkery hat. The witness said he had seen defendant twice before, and knew him as "Breathtaker."

On cross-examination, witness said he gave a statement to the police at the scene and admitted that he had described the men as male Negroes, 27 to 31 years old; that he said he told the police that defendant was known as "Breathtaker" or "Leeatress"; and that he told the police that Leeatress Johnson was one of the men.

Sidney Grobart testified on direct examination that he was the lessee of the premises at 1415 Clybourn Avenue. He identified the building and testified that defendant was a new customer; that he never had any trouble with defendant; and that he had seen him on the night of the fire.

Fulvio Bertani testified that he owned the building at 1415 Clybourn Avenue; that on February 26, 1964, the building was in good condition; and that he never authorized anyone to set fire to the building.

Officer William McInerney testified that he saw Andrew Holloway and Eddie Griffin at the station on February 26, 1964; that on February 27, 1964, he placed defendant under arrest; that he took him to a school and Eddie Griffin and one Larry Brown (who did not testify) identified defendant in the squad car. The witness further testified that the boys described the man as a Negro and that Eddie Griffin and Andrew Holloway each said defendant could pass for white; and that defendant told him, in response to the question of whether defendant was colored or white, that he was colored, to the best of his knowledge and

had always gone around with colored people.

Defendant testified that neither he nor his parents had Negro blood; that he was never known as "Breathtaker"; that he had never seen the two boys who testified; that he never told the police he was colored; and that he did not set fire or attempt to do so on the premises at 1415 Clybourn Avenue. After a hearing in mitigation and aggravation, a verdict of guilty was rendered against defendant and he was sentenced to the Illinois State Penitentiary for two to five years.

Defendant contends

(1) that the evidence failed to prove him guilty beyond a reasonable doubt, and

(2) that the trial court should have conducted a hearing to determine his competency.

Defendant's first contention that he was not proven guilty beyond a reasonable doubt, hinges on the conflict in the testimony of whether or not defendant was a Negro, and/or the alleged failure of the State to corroborate the testimony that defendant was known as "Breathtaker." Defendant points out that the trial court stated:

> As I observed the defendant, as we all have in the courtroom, and if someone were to tell me that he is Negro, I would be surprised in the first instance, but on the other hand, watching him closely on the stand here, if I were subsequently informed that he was a Negro, very light-skinned, it would not seem to me to be so irrational or unreasonable a description as to be completely inaccurate. I believe the boys' story and I don't think it is necessary to go into the questions of racial origin.

Despite the above remarks by the trial judge, we feel there was sufficient evidence of identification to prove defendant guilty beyond a reasonable doubt.

According to the testimony of Andrew Holloway and Eddie Griffin, defendant was no stranger to them at the time of the fire, when he spoke to them from a distance of a few feet. It is uncontradicted that defendant was wearing the clothes described by Holloway and Griffin, at the time of the fire, and it is uncontradicted that

Griffin identified defendant outside the school on the day after the fire. The alibi presented by defendant, that he was in a bar at the time of the fire, is not corroborated by any other person. An examination of Holloway's testimony revealed that he stated "I think he is colored" but not as dark in complexion as his companion. Griffin testified that defendant was "half white and half colored." Defendant testified that his maternal ancestry was unknown.

Holloway's description of defendant to McInerney was that "he was a colored man but he was so light he could pass for white." Griffin's description to McInerney was that the man he had seen was a Negro but very light in color. Defendant after his arrest, informed Officer McInerney that he was colored, to the best of his knowledge, and that he had always thought he was colored and that he had always gone around with colored people. Defendant later denied this conversation. Taking all this evidence in context, however, we feel there was sufficient evidence to sustain the charge of arson.

In response to defendant's second contention, that the trial court should have held a competency hearing, we find the defendant did not exhibit any signs of incapacity to stand trial. On April 1, 1964, defendant, through his appointed counsel, asked for a psychiatric examination by Dr. William H. Haines, M.D., and the request was granted. The diagnosis contained in the report of Dr. Haines was "Periodic Alcoholism. He knows the nature of the charge and is able to cooperate with his counsel." On August 11, 1964, after the finding of guilty, defense counsel described his client as a "sick person" and observed that the Haines report indicated a "mental illness." The trial judge noted the previous confinement in a mental institution and concluded that Johnson ". . . Seems to have a problem of alcoholism." He also knew of the 33 year old defendant's earlier criminal history and had the benefit of the defendant's presence and testimony during the two day trial. The report of the Behavior Clinic, which was read by the

court, declared defendant competent to stand trial. The trial judge observed defendant's conduct throughout the trial. Furthermore, there was no motion, claim, suggestion or showing of incapacity by defendant. The observation by the trial court that defendant was suffering from a problem of alcoholism was not sufficient to require a hearing on defendant's competency. For the above reasons, the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

50565

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES FROEHLICH, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY CRIMINAL DIVISION

MR. PRESIDING JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from a judgment of the Circuit Court of Cook County finding the appellant, James Froehlich, guilty of the crime of aggravated assault, and fining him $50.00 and costs. The sole contention of the appellant on this appeal is that the trial court's judgment of guilty was contrary to the findings of the court.

The facts of the case are as follows: On November 3, 1964 at approximately 11:30 P.M. appellant Froehlich walked into a polling place in River Forest where his wife was working as an election judge, and accosted the complainant, Robert Lee. Appellant accused the complaining witness, a Republican precinct worker, of having harassed appellant's wife in the performance of her duties as a Democratic election judge. Donald Woulfe, witness for the state testified that Froehlich then grabbed Lee by his lapels and spun him around, continued to yell at him about picking on someone his own size (referring to Mrs. Froehlich) and then hit Lee in the chest with his forearm. The two men moved across the room to a point where there was a table on which was sitting a six-pac of cola. According to the witnesses for the People, appellant picked up one of the bottles and raised it over his head as if to strike the complaining witness. Complainant Lee testified that he was in fear of the bottle, that appellant's face was contorted and was ugly and that he was screaming at the top of his voice. On the issue of who picked up a bottle first, the witnesses for the appellant testified that it was complainant, Robert Lee, who first picked up a bottle. No blows were struck; the two men were separated. Appellant left the polling place and the

complainant went to call the police to report the fracas.

Appellant's sole argument on this appeal is that the judgment was contrary to the findings of the trial court. To support this proposition the appellant relies on two comments by the trial court -- "I don't think any time listening to the testimony that there was any threat to strike Mr. Lee with the bottle," and, "Well, I think in all my years--I haven't heard so much testimony--I don't know, I haven't even got the word for it--one says one thing; the other says the other thing." It is appellant's contention that these statements constitute an acknowledgment that the testimony was in conflict, and a resolution of the evidence in appellant's favor, only to turn around and find him guilty.

Appellant's contention is not well taken. In the first place, appellant fails to take notice of another comment of the trial court, "Well, there is no doubt in my mind whatsoever that Mr. Froehlich went up there with an intention to do something...I am going on the legality of these complaints." There were, indeed, conflicts in the evidence. However, it is clear, in spite of the above observations and musings of the trial court that there was sufficient evidence on which to base appellant's conviction and that the trial court resolved the conflicts in the evidence against the appellant. It is not our province to disturb the verdict of the trial court, which was in the position to observe the witnesses and to weigh the credibility of their testimony. Where there is a conflict in the evidence such as the one we have in this case, the law in this state is that the findings of the trial court is to be accorded the same weight as the verdict of a jury, and hence will not be disturbed. People ex rel. Andersen v. Firek, 342 Ill. App. 514, 97 N.E.2d 143.

We have reviewed the record in this case and conclude that the finding of guilty is supported by the evidence, and that the trial court did not commit error in handing down a verdict of guilty

in this case.

For the above reason the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

LYONS, J., and BURKE, J., concur.

50899

In the Matter of the Alleged Delinquency of James Russell Teague, a Minor.	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, FAMILY DIVISION.
Petitioners-Appellees,	)	
v.	)	
JAMES RUSSELL TEAGUE and BERNICE TEAGUE,	)	
Respondents-Appellants.	)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a decree of delinquency entered by the Family Division of the Circuit Court of Cook County, Illinois.

On February 1, 1965, a hearing was held before the Presiding Judge of the Circuit Court of Cook County, Family Division, on a petition to have James Russell Teague, age 15, adjudged a delinquent, the alleged delinquency being an assault upon a teacher.

On January 20, 1965, James was found in the hall at Crane High School, where he is a student, without his hall pass, and was told to have his mother at the school the next morning. On the morning of January 21, 1965, Mrs. Teague appeared at the school and met her son and after an interview with the principal, James was suspended from school for three days for the above infraction. Thereafter, on the same day, James went to Union Park (across the street from his house) and was reminded by the Field Athletic Director, Leonard Lucas, to tell James' brother George (who was on the park basketball team) that there had been a change in the practice time arranged for the following day. James, who had forgotten to give George the message, walked over to the Emerson School, where George was a pupil, apparently intending to tell him. It was at this time that the incident involved in this hearing took place.

Louis Spain, Assistant Principal of the Emerson Branch of McKinley High School, testified that shortly after 2 p.m., on January 21, 1965, he encountered James Teague on the first floor of the school; that he asked Teague where he was going and Teague replied

that he was proceeding to a class on the fourth floor; that he informed Teague that the school building did not have a fourth floor and asked Teague to give his name, which he refused to do; that he also requested that Teague accompany him to his office and this request was similarly refused; that he then placed his hand on Teague's shoulder and again asked him to come to his office; that Teague pushed him, a tussle ensued, during which Teague threatened to stab him; that a janitor came over to help him and Teague was taken to the principal's office; and that a search by a police officer, who was called to the scene, produced a knife which Teague had been carrying.

James Russell Teague testified that he went to the Emerson School to see his brother concerning a basketball practice he was to attend; that he saw his brother and was returning to the school washroom to retrieve a coat he had left there when he encountered Mr. Spain; that Spain asked him what he was doing in the school, since he was not a student; that he replied that he had seen his brother; that Spain then told him to come to his office and grabbed his arm, twisting it; that a struggle followed in which his glasses were broken and his nose bloodied, after which he threatened to stab Mr. Spain; that Spain and a janitor took him to an office; that the police subsequently arrived and found on his person a knife which measured approximately 3-1/2 inches folded; and that he was under suspension from Crane High School at the time of the incident.

Leonard Lucas, a gym instructor for the Chicago Park District, testified that he found James Teague to be a cooperative young man who gave him no trouble.

George Vernon Teague, a brother of James Teague, testified that James came to Emerson School on the date in question and informed him of a basketball practice session.

Miss Christine Marie Doran, James Teague's division teacher at Crane High School, testified as to the circumstances of his

suspension and stated that the youth's reputation for veracity was good, and that he was a law-abiding pupil of the school.

Major Frank W. Johnson, a Salvation Army Officer and Pastor of the Sunday School James Teague attended, testified to Teague's good attendance and said that he had not created a discipline problem.

Bernice Teague, mother of James Teague, testified as to her conversations with Mr. Spain concerning the incident in question.

After final comments by the attorneys, the judge made a finding of delinquency.

Respondents-Appellants' theory of the case is:

(1) that error was committed in allowing the case to be prosecuted by an attorney of the Board of Education and not by a member of the States Attorney's staff,

(2) that the decision is against the manifest weight of the evidence.

We agree with respondents' first contention that error was made by the lower court by allowing the attorney for the Board of Education to present the State's witnesses. An examination of the record does not indicate whether the trial judge knew that the prosecutor was not an Assistant State's Attorney. In oral argument, respondents' counsel stated that he was not made aware of the fact that someone other than an Assistant State's Attorney was prosecuting the case until late in the trial. We feel that it was improper practice for an official of the Chicago School Board to present the case instead of an Assistant State's Attorney. The original complaint was filed by one Louis Spain, as Assistant Principal in the employ of the Chicago School Board. An examination of the record, however, does not show that James Teague was prejudiced.

With reference ~~In response~~ to respondents' second contention, an examination of the record reveals that there was sufficient evidence on which to base the order of delinquency. In a proceeding under the Family Court Act, Ill. Rev. Stat. (1965), Chap. 23, Par. 2001, the

proceeding is remedial in nature and not punitive. The degree of proof necessary to find against a violator of the Act is that of a preponderance of the evidence. In re Urbasik, No. 51004, Appellate Court of Illinois, First District, First Division, filed October 31, 1966.

We feel there was sufficient evidence to meet the above degree of proof. In fact, we find sufficient evidence in the record to meet the criminal degree of proof, which is guilt beyond a reasonable doubt. In a proceeding under the Family Court Act, aggravation and mitigation are taken into consideration in arriving at a finding of delinquency. We feel there was sufficient evidence in the record to sustain the finding of delinquency arrived at by the trial court. For the above reasons the decree of delinquency is affirmed.

AFFIRMED.

BRYANT, P.J., and BURKE, J., concur.

Filed 11-22-66

Abs v 77-11

177 I.A.2 124

A

No. 66 - 15 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
v.	)	Writ of Error to Circuit Court of
JOHN GONZALES, Defendant-Appellant.	)	DeKalb County

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

The defendant, John Gonzales, was charged on an information filed in the Circuit Court of DeKalb County with the crime of burglary. The information specifically alleged that the said John Gonzales did aid and abet one Camilo Sanchez to commit the crime of burglary, specifically in entering the residence of F. R. Geigle with the intent to commit therein a theft. The information also specificially alleged that John Gonzales was present before or during the commission of the offense with the intent to promote or facilitate the commission of said offense.

The defendant appeared before the Circuit Court of DeKalb County on September 6, 1962, where counsel was appointed for him. The Court fully and thoroughly explained to the defendant all of his rights to have his case presented to a Grand Jury and to trial and the full consequences of a plea of guilty. The defendant waived indictment by a Grand Jury, consented to prosecution by information, waived jury trial and after being admonished again of the effect and consequences of his plea persisted in

his plea of guilty. The defendant, on September 11, 1962, was sentenced to the Illinois Penitentiary for a term of not less than three nor more than eight years.

The record before us discloses that on July 24, 1962, the defendant and one Camilo Sanchez, while riding in a stolen vehicle, stopped at the residence of one F. R. Geigle in DeKalb County; that Sanchez got out of the car and rang the front doorbell. When no one answered the door, he went around to the back of the house and forcibly entered it. Mrs. Geigle ran out of the front of the house after Sanchez forcibly entered the rear. At this point, the defendant called to Sanchez. The defendant and Sanchez were arrested as they fled the scene together at high speeds in the stolen automobile.

The defendant contends that he was not charged with burglary nor was he charged as principal and, therefore, the judgment should be reversed.

The information charged the defendant with being an accessory before the fact in the language of the Statute, Ill. Rev. Stat. 1961, Chap. 38, Sec. 5-1, et. seq. The information also charged the commission of the offense of burglary in the language of the Statute defining that offense, Ill. Rev. Stat., 1961, Chap. 38, 19-1.

We have carefully considered the authorities reliedupon by the defendant and do not find them to be in point. The information set forth sufficient facts to properly charge the crime of burglary and the plea of guilty thereto admitted all of the facts well pleaded. The People v. Thompson, 19 Ill. 2d 330, 331 (1960). Under the Criminal Code, no distinction exists between accessory before the fact and the principal. Both may be treated and punished in the same manner. The People v. Clements, 28 Ill. 2d 534, 540 (1963). The cases have uniformly held

that an accessory before the fact can be charged and tried as principal. People v. Valentine, 60 Ill. App. 2d 339, 352 (1965). The information before us properly charged the defendant with being an accessory before the fact to the crime of burglary in that he was present before and during the commission of said offense with the intent to promote and facilitate the commission of the offense. Judgment of conviction is affirmed.

JUDGMENT AFFIRMED.

MORAN, P. J. and SEIDENFELD, J. concur.

Filed 11-23-66

77 I.A.2 127

Case No. 66-26

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

A.D. 1966

ELMO E. KOOS, Plaintiff-Appellant, vs. PERE MARQUETTE BUILDING CORPORATION, an Illinois Corporation, and EDWIN A. BOSS, Defendants-Appellees.	Appeal from the Circuit Court of Peoria County, Illinois. Honorable Robert E. Hunt, Judge Presiding.

STOUDER, J.

This is an appeal from an order of the Circuit Court of Peoria County dismissing a complaint for want of prosecution.

On June 29, 1951, Plaintiff-Appellant Elmo E. Koos, an attorney and minority shareholder of the Defendant-Appellee, Pere Marquette Building Corporation, filed pro se his complaint in equity. The complaint in substance alleged that the execution of a lease by the Defendant with respect to its hotel property was injurious to the rights of Plaintiff and prayed that such lease be set aside. Service of summons was duly made upon the Defendant. Defendant filed its motion to dismiss the complaint and on September 18, 1953 the court denied such motion and ordered Defendant to plead within 30 days. Defendant filed its answer on May 18, 1954. On June 18, 1958, at a peremptory call of the docket, the case was referred to a Master for hearing at the request of Plaintiff. No hearings having been held, the court on September 9, 1963, at another peremptory call of the docket, ordered a hearing within 20 days. Within the 20 day period a hearing was scheduled before the Master in Chancery but on account of scheduling problems the hearing was continued from time to time and finally scheduled for December 16, 1963. On December 13, 1963 Plaintiff caused a Subpoena Duces Tecum to be issued directing

the appearance of Charles L. Swords, President of Defendant, to appear at the hearing December 16, 1963. Plaintiff was advised by the sheriff that the subpoena had not been served because the witness was in Florida and on December 16th Plaintiff moved for a continuance alleging that Charles L. Swords was an important witness and could not be served with a subpoena. The Master in Chancery continued the hearing generally to be set by agreement or upon application of either party. On January 21, 1966 the court, on its own motion, revoked the reference to a Master, the Master in Chancery practice no longer being in effect, and set the case for hearing as a bench trial for January 24, 1966. Prior to such date Plaintiff moved for a continuance on the grounds of urgency of other cases and other business and the hearing was continued until February 8, 1966. On February 4, 1966 another Subpoena Duces Tecum was issued at the request of Plaintiff for the appearance of Charles L. Swords at the hearing on February 8, 1966. Again the sheriff was unable to serve the subpoena because the witness was in Florida. On February 7, 1966 Defendant filed its motion to quash the subpoena and on February 8, 1966 Plaintiff did not appear. The Court then advised Plaintiff by letter that all motions would be heard on February 22, 1966. On February 21, 1966 Defendant filed its motion to dismiss the complaint for want of prosecution and on February 22, 1966 Plaintiff requested a continuance of the hearing alleging that he had insufficient time to prepare an answer to the motion to dismiss. The court took the motion to dismiss under advisement until February 25, 1966, directing Plaintiff to file any answer which he deemed necessary prior thereto. Defendant filed an answer together with an affidavit reciting a history of the case. Thereafter the court ordered the complaint dismissed for want of prosecution, delay, laches and in the interest of justice and good court administration.

In seeking a reversal of the order of the trial court, Plaintiff argues First, dismissal for want of prosecution is justified only where it is clear that the Plaintiff intended to abandon the cause. Secondly, even though at some prior time a party had neglected to prosecute his claim, if he is doing so at the time of the hearing of a motion to dismiss for want of prosecution, it should not be granted. Thirdly, a motion for dismissal for want of prosecution should not be granted where

the defendant has caused delay.

We find no support for Plaintiff's contention that an intention to abandon his claim is the only justification for dismissal of a claim for want of prosecution. The general rule is that it is the duty of a Plaintiff to prosecute his suit with due diligence, and, if there is unreasonable delay, suit will be dismissed unless the delay is shown to be excusable. Sanitary Dist. v. Chapin, 226 Ill. 499, 80 N. E. 1017, Svela v. Bloch et al, 294 Ill. App. 515, 14 N.E. 2d 299. From a statement of the general rule it can be concluded that the presence or absence of evidence indicating an intention to abandon a claim is only a circumstance to be considered in the application of the rule.

In seeking to determine whether or not a claim has been prosecuted with due diligence the conduct of the parties over the entire period of the pendency of the claim must be considered. The mere fact that the claimant may now urge that he is ready, willing and able to proceed with his claim does not require the conclusion that the claimant has exercised due diligence when his conduct in the past is to the contrary. From the record the conclusion is inescapable that during the 15 years of the pendency of this action the Plaintiff did not on his own initiative undertake any action designed to conclude the litigation on its merits. Plaintiff reacted only at the insistence of the trial court in 1958, 1963 and again in 1966, even then Plaintiff's response was nominal and perfunctory. If the facts which might have been supplied by Mr. Swords were important to Plaintiff's case, the failure of Plaintiff to do anything except attempt to serve subpoenas three or four days before hearings were scheduled, is unexplained. Alternative methods of eliciting such information were available and absence of any evidence that the Plaintiff under took any alternative methods during the 15 years does not sustain his allegation that he proceeded with due diligence.

In Sheehan v. Supreme Lodge K of P, 237 Ill. App. 530, the Defendant was a foreign corporation which did not have a resident agent upon which service of summons could be had. Even though the Plaintiff periodically had summons issued which was returned, "Defendant not found", by the Sheriff, the court concluded

that the Plaintiff's failure to undertake an alternative method of service on the Auditor of Public Accounts, as was appropriate under such circumstances, indicated a lack of due diligence on the part of the Plaintiff.

We also believe that the nature of the cause of action is appropriately considered in assessing the diligence of the Plaintiff. Where equitable relief is sought equitable defenses such as laches, whether existing at the time suit is filed or whether arising from unreasonable delay after the suit is commenced, are appropriately considered. Trustees of Schools vs. City of Chicago, 308 Ill. App. 391. To set aside a lease as requested by the complaint in this case, 15 years after the commencement of the action, is not in accord with principles of equity.

We find no support in the record for Plaintiff's contention that the delay was occasioned by Defendant's conduct. Two hearings were set in this case 12 and 15 years respectively after the commencement of the action. The fact that the president of the Defendant corporation was unavailable 3 or 4 days before each hearing so that a subpoena could not be served upon him does not warrant the conclusion that the Plaintiff's lack of diligence was caused by the conduct of the Defendant and thereby excused. Rather such facts indicate the lack of diligence of Plaintiff in seeking a culmination of the litigation on its merits.

Finding no error in the judgment of the Circuit Court of Peoria County judgment is affirmed.

JUDGMENT AFFIRMED.

Coryn, P.J., and
Alloy, J. concur.

77 I.A.2 151

Abstract

No. 66-42 M

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, vs. HOWARD H. LERCH, Defendant-Appellee.	)	Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois, Magistrate Division.

MR. PRESIDING JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

This appeal, transferred by order of the Supreme Court to this Court, (People v Lerch, 34 Ill. 2d 305) arises from an order of a magistrate in Winnebago County granting a motion to suppress evidence.

On February 22, 1965, an officer of the Illinois State police, while on duty, received a telephone call informing him that two slot machines were located in the storage room of defendant's gas station. His tour of duty terminated at two o'clock in the afternoon and he went home. At about six o'clock the same day, four hours later, he contacted a fellow officer, also off duty, and both, while dressed in civilian clothes, proceeded to the defendant's gas station arriving at about 6:20 o'clock P.M.

The officers entered the front door of the service station which was open for business. The doorway led into a large room known as the bay area which contained a wash-rack and grease-rack. At the time of entering, one of the officers walked into the office section of the station and the other proceeded to the rear of the bay area where he encountered an attendant by the name of Duffy.

The attendant had opened the storage room door, located at the rear of the bay area, to obtain some hand soap. In order to accomplish this it was necessary for him to only partially open the door. As Duffy was closing the door, the officer that was standing in the bay area "caught a glimpse" of a slot machine located in the storage room. He then entered the storeroom and found two slot machines located therein. The excerpts from the record disclose a contradiction in the testimony concerning whether or not the officer could possibly have "caught a glimpse" of any slot machine while the door was partially open.

Nevertheless, the trial magistrate in his memorandum of decision made certain findings, none of which found that the officer did not see the slot machine in question, nor that he disbelieved that the officer "caught a glimpse" of the evidence in question. Instead, the magistrate found that although the officer testified that he "got a glimpse" of the evidence, it was not open to view within the reasoning of the applicable case law. However, the applicable case law was not specified. The magistrate was of the opinion that the officers upon entering the premises, normally accessible to the public, were there for the purpose of searching for contraband evidence and that there had been sufficient time elapse for them to obtain a search warrant. The memorandum went on to state:

> " (d) That, although the law is clear that contraband open to observation may be seized, it is necessary to distinguish between seaches (sic) and seizures, and it is a violation of the constitutional guaranty to conduct an unreasonable search for evidence which is subject to seizure. A search unlawful in its inception cannot thereafter become lawful because of the nature of the evidence discovered and seized." (Emphasis added)

This Court finds, from the evidence presented, that no search was involved, let alone an unreasonable search. There is no evidence that the officers invaded any portion of the station not open to the public until after viewing the contraband evidence. As was stated in The People v. Cattaneo, 6 Ill. 2d 122, 124-125 (1955):

> "The seizure occurred at a time when the tavern was open and accessible to the public, and the articles were in plain view of the officers. There was no search involved. A search implies a prying into hidden places for that which is concealed, and it is not a search to observe that which is open to view. (People v. Marvin, 358 Ill. 426.)"

Consequently, the order appealed from is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

REVERSED AND REMANDED.

Davis and Abrahamson, JJ., concur.

50770

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES RAY, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Criminal Division.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendant was convicted in a jury trial of the crimes of robbery and rape and was sentenced to the penitentiary for concurrent terms of ten to twenty and twenty to thirty years.

He contends on appeal that the trial court erred in allowing hearsay testimony to be admitted, in refusing to order the prosecution to turn over police records to the defendant for the purpose of cross-examination and in refusing instructions offered by the defendant. The sufficiency of the proof to establish the defendant's guilt is not questioned.

The prosecutrix, a Chicago housewife, was returning home on a dark evening in wintertime after buying a loaf of bread at a local grocery store. When she was two doors from her home the defendant seized her from behind, put his arms around her neck, threatened to cut her throat if she screamed, forced her down an alley, through a vacant lot and into an abandoned car and took her watch and $1.70. He then forced her into a second car where he made her remove her clothing and, at knife point and against her will, had intercourse with her four times in the span of four hours.

The testimony to which the defendant objects as hearsay occurred during the testimony of the two police officers. The

first officer was assigned to investigate the case. He met the prosecutrix at the hospital where she had been taken after being released by the defendant. She gave him a sweater which belonged to the defendant and together they returned to the scene. He examined an abandoned car pointed out by her and found the defendant's hat on the floor of the rear seat. On cross-examination he said that it was a snowy night—that four or five inches had fallen. He related that the prosecutrix had told him there were two cars and that one had a broken window. He was asked, in reference to the first car, if the prosecutrix had said that that was the car where "this thing had happened." He replied, ambiguously, that this was the first car they had gotten into. The defense counsel then shifted his line of questioning. On redirect examination the prosecutor asked him what else the prosecuting witness had said about the first car. Over objection, he replied that she told him that the first car had a broken window and the snow was blowing in so the defendant took her to another car.

The defendant's contention that this testimony was improperly admitted is without merit. When one party, on cross-examination, brings out a portion of a statement or conversation from a witness the other party, on redirect examination, is allowed to elicit the entire conversation. Darling II v. Charleston Memorial Hospital, 50 Ill. App. 2d 253, 200 N.E.2d 149 (1963); People v. Kostos, 21 Ill. 2d 496, 173 N.E.2d 466 (1961); People v. Munday, 280 Ill. 32, 117 N.E. 286 (1917). This rule is based upon the proposition that it would be unfair to allow one party to introduce into evidence half-truths or statements taken out of context without allowing

the other party to bring out the whole truth or put the statement in its proper perspective. VII Wigmore, Evidence, secs. 2094, 2113, 3rd Ed. (1940); McCormick, Evidence, secs. 32, 56 (1954). By asking the officer what the prosecutrix had said about the first car, the defendant opened the door for the State to bring out, on redirect examination, the substance of the conversation. The trial court did not err in allowing this testimony to be admitted in evidence.

The second officer testified concerning the complaint made to the police by the prosecutrix. This complaint was made shortly after she had told her husband and relatives of what had taken place. In answers which were not responsive to the prosecutor's questions the officer quoted her as saying that she had been raped and that she had pointed out the automobile in which she had been raped. An objection was made to each answer. The court sustained the objections, struck the answers and instructed the jury to disregard them. The defense also moved to withdraw a juror. The motion was denied.

The withdrawal of a juror rests in the discretion of the trial court and this court will not disturb his ruling in the absence of evidence showing that the discretion was clearly abused. The answers of the police officer were inadvertent but they were hearsay and in each the word "raped" was used. However, the trial court immediately struck the testimony and ordered the jury to disregard it. Likewise, the court specifically struck the legal conclusion that the prosecutrix had been raped. In light of the action

taken by the trial court we cannot say that the defendant was prejudiced by the testimony. People v. Kirkwood, 17 Ill. 2d 23, 160 N.E.2d 766 (1959); People v. Levin, 292 Ill. App. 413, 11 N.E.2d 224 (1937); People v. Singer, 288 Ill. 113, 123 N.E. 327 (1919).

The defendant's next contention is that the trial court erred in not permitting his counsel to examine police records for the purpose of cross-examination. After the two police officers had testified the prosecuting witness was called to the stand. Near the termination of her cross-examination the attorney for the defendant requested police records which he had asked the State to produce. A recess was held and the attorney was advised that he was not entitled to all the records but only to those which could be used to impeach the witness who was on the stand. The court instructed the prosecutor to give the attorney any statement made by the witness. The prosecutor said that there were no written statements made by her but that he would turn over to the court what he had and would let the court decide what should be made available to the attorney. The court examined what was called a "composite report" and the court determined that there was nothing in the report upon which the witness could be cross-examined. It is the defendant's contention that his counsel should have been allowed to inspect the records and that it was for him, not the court, to decide what the records showed.

If it is developed in a trial that a statement was made by a State witness or that there was a substantially verbatim account taken of a conversation with the witness, the defendant

is entitled to the statement or the account to determine if they contain material which could be used to impeach the witness. But a defendant is not entitled to the delivery of the complete prosecution file. People v. Wright, 30 Ill. 2d 519, 198 N.E.2d 316 (1964). In People v. Wolff, 19 Ill. 2d 318, 167 N.E.2d 197 (1960) the court said:

> "...where no privilege exists, and where the relevancy or competency of a statement or report has been established, the trial judge shall order the document delivered directly to the accused for his inspection and use for impeachment purposes. However, if the prosecution claims that any document ordered to be producedcontains matter which does not relate to the testimony of the witness sought to be impeached, the trial judge will inspect the documents and may, at his discretion, delete unrelated matters before delivery is made to the accused."

In the present case no foundation was laid showing that the prosecutrix had made a written statement or that one had been reduced to writing. The prosecutor said she had not and the defendant's attorney acknowledged that he understood this to be so. The prosecutor stated that the only document which might be relevant was the composite report of the investigating officer in which the officer reported that the witness had told him that she could identify her assailant. The court examined the report and found that the witness could not be impeached on such a statement and that there was nothing else that could be used for impeachment purposes. It was proper for the court to examine the report and it was likewise proper to deny the defendant access to the report and records.

The final contention of the defendant is that the trial court erred in refusing an instruction requested by the defendant on the subject of identification. People v. LeMar, 358 Ill. 58, 192 N.E. 703 (1934), is cited as authority for the proposition that the defendant is entitled to have his theory of defense based upon lack of proper identification submitted to the jury.

However, in the present case the defendant has submitted to this court in his abstract of the record only the instruction that was refused and one other instruction. We are unable to ascertain whether other instructions were given upon the subject of identification or, if instructions were given, whether or not they were correct. It has been repeatedly held that an assignment of error pertaining to instructions to the jury will not be considered on appeal unless all of the instructions are set forth in the abstract. People v. Brown, 25 Ill. 2d 423, 185 N.E.2d 161 (1962); People v. Miller, 33 Ill. 2d 439, 211 N.E.2d 708 (1966); People v. Todaro, 14 Ill. 2d 594, 153 N.E.2d 563 (1958).

The judgment of the Criminal Division of the Circuit Court is affirmed.

Affirmed.

Sullivan, P.J., and Schwartz, J., concur.

Abstract only.

Ch. 77 #1

A

50701

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES POLLARD, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

After a jury trial, defendant was found guilty of robbery and aggravated battery. He was sentenced to 5 to 15 years and to 3 to 10 years respectively, with the sentences to be served concurrently. On appeal, defendant contends (1) he was denied a fair trial, and (2) he was not proved guilty beyond a reasonable doubt.

On December 14, 1964, at about 12:30 A.M., Winfield Tice alighted from a taxicab in front of his home at 63 East Elm Street, Chicago. As he opened the front door, he "was grabbed and wrestled," and he called for help. Tice received "a complete mauling." As he lay on the sidewalk, bleeding, with two men "going over me," the cab driver threw "a light on these people," and they fled westward on Elm Street. The cab driver followed them, and Tice entered his home and called the police. Within fifteen minutes the police brought back two suspects, and Tice definitely identified the defendant. Later, after having a cut in his chin stitched, Tice, at the police station, again identified the defendant. He testified that his watch and $12.00 in currency was taken. He also said that there were two men, but he could not identify the other man "because I don't recall seeing him."

On cross-examination, Tice explained that he was able to

identify the defendant because he saw his face when the light was shone on him by the cab driver. Tice was lying on his right side, and "I could look up because he [defendant] was in a kneeling or squatting position." Tice also relied on the "trousers, shoes, hat, and face" as further means of identification.

The cab driver testified that he had brought Tice from the airport to 63 East Elm Street, where Tice got out of the cab, and the driver saw two men attack him. He put his spotlight on them, and they fled toward State Street. The cab driver turned his cab around and, after following defendant for several blocks, alerted police officers in a squad car, and they arrested defendant.

On cross-examination, he testified, "I saw this man's face good," and he described in detail the route taken by defendant until arrested. Traffic was not heavy on any of the streets, and there were few people walking or standing around--"I was looking right at him at all times."

A police officer testified that they were on their way to the scene of the robbery when "we were flagged down at Cedar and Rush by a cab driver. He told us to follow a man and he pointed out the man. The man he pointed out is the defendant. * * * Traffic was very light. No one else was walking in that vicinity other than this individual." When arrested, defendant was informed that he had been pointed out "as being the offender" of a recent robbery, and defendant said he had just come from the Chicago Theater and was looking for a subway to get home. The officer testified that the Chicago Theater was at State and Lake with a subway entrance approximately in front of the theater, also that 63 East Elm Street is "a good two miles from the

Chicago Theater." Tice identified defendant immediately after the robbery and again at the police station "and made a positive identification." On cross-examination, the officer said that they found no weapon on defendant, no bloodstains on his clothes, nor any of the stolen property.

Defendant testified that he lived at 5249 Prairie Avenue, and that he had left the Chicago Theater at "11:15 to 11:30. I walked north on State Street in order to get a bus because I couldn't ride the CTA; I mean the El. The El would make me sick. I kept walking north on State Street because it was a cold night out and I didn't want to stand in one spot. I kept walking until I found a bus. I was at the corner of State and Cedar when I was arrested by the police." He stated that Tice did not identify him, and that he had never seen Tice before nor did he assault or rob him.

Contending that "the evidence is insufficient to support a conviction beyond all reasonable doubt," defendant relies on People v. Cullotta, 32 Ill.2d 502, 207 N.E.2d 444 (1965), where our Supreme Court said (p. 504):

> "We have reiterated the rule that a conviction cannot be deemed to be sustained by evidence beyond a reasonable doubt if the identification of the accused was vague, doubtful and uncertain. * * * [T]he attendant circumstances, including the opportunity for definite identification, must be carefully weighed and considered."

There, the court noted that the attendant circumstances were far from affording a favorable opportunity for positive identification, and the officers had but a fleeting view of the men identified.

Defendant argues that neither Tice nor the cab driver had favorable opportunities to make accurate observations of

defendant. Also, defendant, when arrested, possessed neither a weapon nor any of the items taken from the complainant, nor was any blood found on his clothing, and "this raises a strong presumption of defendant's innocence."

Considering the positive testimony of both Tice and the cab driver, which was unshaken on cross-examination, we are not persuaded that the identification of defendant "was vague, doubtful and uncertain." Although defendant denied participation in the robbery and did not possess any of the fruits of the crime at the time of his arrest, it was the province of the jury to weigh the testimony and determine the credibility of the witnesses. "Where the truth lies, in any debatable set of circumstances, is a matter peculiarly for the determination of the trier of the fact, be it judge or jury, and it is not for a reviewing court to substitute its opinion therefor." People v. Woods, 26 Ill.2d 582, 585, 187 N.E.2d 692 (1963).

Defendant's further contention that the trial court improperly limited the cross-examination of the complainant is without merit. The record shows that defendant had a fair and impartial trial.

We conclude the evidence here supports defendant's conviction of both charges beyond a reasonable doubt and, for the reasons given, the judgment of the Criminal Division of the Circuit Court of Cook County is affirmed.

AFFIRMED.

KLUCZYNSKI, P.J., and BURMAN, J., concur.

Abstract only.

11-23-66

v 77 #2

177 I.A.2 219

No. 66-87

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

A

HELEN P. POINDEXTER, Plaintiff-Appellee, -vs- NORMAN WILLIS, Defendant-Appellant.	Appeal from the Circuit Court of Madison County, Third Judicial Circuit of Illinois.

George J. Moran, J.

Defendant appeals from a judgment of the Circuit Court of Madison County, Illinois, which found defendant to be the father of plaintiff's child and ordered him to pay for its support and maintenance, and to pay for certain medical expenses incurred in the birth of said child.

The defendant, a resident of the State of Ohio, contends that the Circuit Court of Madison County, Illinois, did not acquire personal jurisdiction over him and therefore could not render a personal judgment against him.

Plaintiff filed a two-count complaint against the defendant under Illinois Revised Statutes, Ch. 106-3/4, Sec. 64. In Count I she sought to establish paternity of her child, born out of wedlock, and to enforce the liability of defendant for the reasonable expenses of the plaintiff during her pregnancy and to establish and enforce defendant's liability for the support and maintenance of the child. Count II repeated all of the allegations of Count I and then added a request for the sum of $25,000.00 for actual damages the claimant claimed she sustained as a result of defendant's breach of promise to marry her.

Defendant filed a motion challenging the court's jurisdiction over his person on the ground that he was not amenable to service in Ohio, since he was not a resident of the State of Illinois and since the complaint did not charge him with committing a tortious act in Illinois. After the denial of this motion, the

defendant filed an answer to the complaint denying each and every allegation of the complaint and also renewing his objection to the jurisdiction of the court over his person.

The trial judge then heard evidence on the case and found the issues in favor of the plaintiff and against the defendant on Count I of the complaint. He ordered the defendant to pay the sum of $1460.00 for the reasonable medical expenses incurred in the birth of said child and also ordered him to pay the sum of $100.00 per month for the support and maintenance of said child. No finding was made on Count II of the complaint.

The defendant filed a notice of appeal from the trial court's judgment on May 5, 1966. On August 4, 1966, the trial judge entered the following order:

> Judgment of this Court having been entered herein on April 7, 1966, and it appearing to the Court that multiple claims for relief are involved in this action (Counts I and II of the Complaint), said judgment having been rendered on Count I only, the Court does hereby expressly find that there is no just reason for delaying enforcement of or appeal from the judgment of this Court entered on April 7, 1966. This Order is entered pursuant to Illinois Revised Statutes 1965 Chapter 110, Sec. 50 (2) and this Order is entered Nunc Pro Tunc on August 4, 1966, for the date of April 7, 1966.

This appeal was perfected on May 5, 1966, when the Notice of Appeal was filed in the trial court (Illinois Rev. Stat. 1965, Chapter 110, Sec. 76). The only questions we can consider on this appeal are those existing when the Notice of Appeal was filed. Therefore, the order of the trial court made on August 4, 1966 was void. Brehm v. Piotrowski, 409 Ill 87; Amer. Smelting Co. v. City of Chicago, 409 Ill 99; The People Ex Rel. Doty v. Dusher, 24 Ill 2d 309.

Since the judgment of the trial court did not settle all of the issues between the parties, this court has no jurisdiction of this appeal. Ill. Rev. Stat., 1963, Chapter 110, Sec. 50 (2). The appeal is, therefore, dismissed.

Appeal dismissed.

CONCUR:

Honorable Joseph H. Goldenhersh

Honorable Edward C. Eberspacher

PUBLISH IN ABSTRACT ONLY.

Filed 12-9-66

177 I.A.2 274

No. 66-11

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1966.

Abstract

J. C. FIELD, WALLACE E. MONIER, JOHN H. KIRKPATRICK, named as Trustees in and under the last will and testament of CLEMENT V. FIELD, Deceased,

Plaintiffs-Appellees,

vs.

LOUIS DUNN,

WILLIAM G. CLARK, Attorney General of Illinois,

Objector-Appellant.

Appeal from the Circuit Court of Bureau County. No. 25788 In Chancery

Honorable Hobart W. Gunning, Trial Judge.

ALLOY, J.

This is an appeal from an order of the Circuit Court of Bureau County affirming the interlocutory report of plaintiffs, J. C. Field, Wallace E. Monier and John H. Kirkpatrick, as Trustees under the Last Will and Testament of Clement V. Field. The plaintiffs are the surviving trustees named under the will of Clement V. Field. In such will the trustees were directed to administer a charitable trust for the maintenance and preservation of a home for indigent old men in Princeton, Illinois.

On September 21, 1961, trustees, pursuant to court order, filed an interlocutory report accounting for income and expenditures during the preceding period from August 1, 1960, to January 31, 1961. In the report was

an exculpatory statement explaining the loss of $32,515 of trust assets due to the criminal actions of one Len D. Spaulding, Jr. The losses were occasioned by the misappropriation of proceeds of loans made to individuals through the use of notes which were taken in bearer form secured by trust deeds in the nature of mortgages of real estate. One note was a valid bearer note known as the Kirkpatrick note in the sum of $10,000. A trust deed of real property naming Spaulding as trustee in the trust deed was given as security for such note and duly recorded. A part payment was made on the note but the balance on the principal unpaid to the trustees was embezzled by Spaulding. Three other bearer notes known as the Cohrs, Gerber, and Hencke notes were forged notes also ostensibly secured by trust deeds but the valid notes secured by the trust deeds were in fact transferred to a third party so that only a forged note in each of the three cases was delivered to the trustees. This accounted for the total loss referred to in the sum of $32,515. On September 23, 1961, the Attorney General of the State of Illinois filed objections to the report of trustees and prayed that the trustees be surcharged with the amount of such loss in the sum of $32,515 in that they were negligent in acting in their fiduciary capacities.

The evidence disclosed that the trustees were approached on various occasions by Spaulding, who was an attorney, with certain propositions on behalf of proposed borrowers for the investment of trust assets. These investments were made as loans which were to be evidenced by bearer notes and secured by trust deeds of real estate. In each of the instances, the trust deed was prepared in form naming Len D. Spaulding as trustee. The notes were made payable to bearer. The record in this case discloses that it was customary in the community to make loans in this form, and that the selection of a person to be named as trustee in the trust deed was commonly made by

naming an attorney or even naming a person who is not otherwise connected with the transaction or who may not in fact know he is being therein designated as trustee in the trust deed. This procedure was used as an alternative to a mortgage naming the beneficial owner of the note. The purpose of this type of transaction (the evidence indicated) in many cases is to prevent disclosure of the real beneficial ownership of the notes or to prevent publicizing such ownership. In connection with the making of the investments in the cases before us, the trustees were not present at the time of execution of the trust deeds or notes but delivered a check payable to Mr. Spaulding who was acting for the borrowers in the amount to be so invested. While there is some evidence of delay in delivery of some of the notes, the notes were delivered ultimately to the possession of the trustees. The trustees never had title to the real estate described in the trust deeds since the title was in the borrower in each case, and the trust deeds were simply a form of mortgage security which was ostensibly given to secure the notes. The record indicates that Spaulding was the nominee of the borrowers as trustee in all of the trust deeds.

In the objections filed in the trial court, the Attorney General specified that the trustees were negligent (1) in failing to properly manage the trust and to handle the investments themselves; (2) in improperly delegating to an attorney duties and responsibilities which were theirs individually; (3) in improperly permitting their attorney to procure mortgage investments for them and permitting their attorney to act as mortgagee; (4) in improperly permitting their attorney to disburse and collect trust assets; and (5) in failing to exercise proper supervision and control over their attorney. The testimony supported the conclusions of the court that the use of the nominee practice which was pursued in this cause is customary and acceptable in Bureau County

not acting as their attorney in any of the transactions whereby the notes were purchased. The record shows that he was in fact acting for the borrowers and held himself out as attorney for the borrowers. It is clear from the record that Spaulding embezzled the payment made on the Kirkpatrick note and also that Spaulding forged the other three notes and appropriated for himself the funds paid to him as agent for the borrowers by the trustees and by others in their purchase of notes. Thereafter, he had been imprisoned as a result of a guilty plea and sentence on such transactions. The record indicates that the trustees had no knowledge of the embezzlement or of the forgeries. The trust funds which the trustees had on hand were kept on deposit in an account in a Princeton bank. Checks were drawn on the trust account in making the investments. The loans were made under circumstances which were consistent with the local practice in the making of such loans. Spaulding represented that he was and, in fact, acted as the agent of the borrowers. The trustees had no knowledge that Spaulding had embezzled a portion of the funds or that the three notes were forged. They had received a report of the recording of the trust deeds and in all respects reasonably assumed that the loans were being handled in a proper manner consistent with local practice. The notes were held by the trustees and title to the notes upon which the loans were made was never vested in a nominee.

Under the will of Clement V. Field, testator gave the trustees very broad and unlimited powers and had such confidence in his trustees that he did not even require a bond of them. He directed the trustees to invest and reinvest in whatever securities or real estate or other investments deemed safe and satisfactory to said trustees with the choice of the investments to rest entirely in the discretion of the trustees. The net effect was to grant to such trustees the right to make any investments which in their judgment they

considered prudent investments. They were thus not limited by conditions and restrictions which normally might be imposed upon trustees in the investment of trust funds (MERCHANTS LOAN & TRUST CO. v. NORTHERN TRUST CO., 250 Ill. 86, at 93).

Assuming that this Court applies Paragraph 36 of Chapter 148 of the Wills Act to the present situation, there would be no basis for reversal on this ground since the trust assets which were the notes were never registered in the name of a nominee of the trustees under the record before us. The same conclusion would result from a consideration of the acts of the trustees under common law precedents. On the alternative contention made by appellant in this Court that the trustees are chargeable with the loss of trust assets because of their failure to exercise proper supervision over the nominee, it is asserted that the trustees should have taken the necessary steps to secure the payment of principal and income to themselves and should have notified the borrowers of the trust funds that the trustees held the notes and wished to have payments made directly to them. It is said that if this had been done, Spaulding probably would not have been able to embezzle a portion of the principal of the valid note and the trustees might have been able to recoup the funds from Spaulding.

In examining the record and the conclusions of the trial court, it is apparent that such court was justified in determining that the trustees had handled and concluded each of the loan transactions in accordance with the accepted practice in the county and that nothing in the conduct of the trustees disclosed a basic failure to exercise ordinary prudence in the making of the loans or the supervision thereof. The circumstance that the trustees did not actually see the notes signed, in view of the record in this case, was not abnormal nor was it unusual to pursue the course of action adopted by the trustees.

The record shows that Spaulding, (in whom the trustees previously had complete confidence, and who had acted as their attorney as well as an attorney generally in the community) was adroit in his handling of the transactions so as not to arouse any suspicion. His conduct appeared to be reasonable as he acted as attorney for the borrowers and handled the transaction in a manner which was customary in the community.

It is well established that trustees ordinarily are not liable for the loss on investments, where they have invested within the scope of their authority, as was true here, and have exercised the utmost good faith and reasonable prudence, care and diligence (WYLIE v. BUSHNELL, 277 Ill. 484, 505; PANK v. CHICAGO TITLE & TRUST CO., 314 Ill. App. 53, at 65). In the instant case, on the basis of the record and the conclusions of the trial court, it is apparent that the trustees could not have foreseen that the notes would be forgeries or that Spaulding would embezzle funds paid thereon. The making of the loans on the security of trust deeds in the nature of mortgages in accordance with the local custom was justifiable. There is no question as to the good faith of the trustees in making such loans.

The trial court made extensive findings of fact including the custom in the community of using a nominal trustee in a trust deed in lieu of a mortgage, and found that this practice was considered desirable for a number of reasons including that of preventing the borrower from knowing the exact identity of the lenders; that bearer notes were used to facilitate transfer; that in fact it was the custom in the community for lenders to go to the attorney or the banker who was handling the transaction and leave with the attorney or the banker a check for the amount of the loan in transactions of this type. It was also customary at the time fixed for payment of principal or interest to take the notes to the banker or attorney and leave the notes with him for present-ment to the borrower when the borrower made such payments. While lenders

customarily checked the premises covered by the trust deed to determine whether the security offered was of sufficient value to secure the loan, it was not the practice to inquire of the borrower as to whether the notes held were genuine, since one of the purposes of the trust deed method was to preserve the anonymity of the lender. The conclusion of the trial court was that the trustees, in making these investments followed exactly the procedure used by reasonably prudent businessmen in the vicinity in lending their own personal funds and that the manner in which the trustees loans were handled, insofar as the trustees were concerned, was identical with the practice in the community followed by responsible businessmen. The trial court also found that since the trustees had received their interest payments (which were in fact made by Spaulding) there was no negligence on the part of the trustees in failing to make inquiry, prior to the time inquiry was in fact made a few months before the extensive misappropriation of these and other funds by attorney Spaulding was brought to general knowledge. The court determined that the losses resulted exclusively from the wrongful conduct of Spaulding and in no manner was chargeable to the trustees.

The record in this cause supports the findings and conclusions of the trial court that the objections of appellant should be overruled. The order of the Circuit Court of Bureau County will, therefore, be affirmed.

Affirmed.

Coryn, P. J. and Stouder, J. concur.

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General No. 10768 Agenda No. 66-74

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

Jennie J. Bruckert and Jennie J. Bruckert, Administrator of the Estate of Clarence K. Bruckert, deceased, Plaintiff-Cross Defendant-Appellee, vs. National Home Life Assurance Co., a corporation and Citizens Savings and Loan Association of East Alton, a corporation, Defendants. # # # # National Home Life Assurance Co., a corporation, Defendant-Cross Plaintiff-Appellant.	Appeal from Circuit Court Macoupin County

Smith, J.

The trial court entered judgment for $7,100.00 in favor of the plaintiff administrator on a group life insurance certificate issued in the name of Clarence K. Bruckert, the decedent. It dismissed the suit against the Savings and Loan Association and denied the cross-complaint of the insurance

company seeking to reform the insurance contract to name Jennie J. Bruckert as the insured. The insurance company appeals.

Undisputed facts disclose that Jennie J. Bruckert and her husband obtained a $15,000.00 mortgage loan from Citizens Savings and Loan Association. The association had a contract with the insurance company for the issuance of group mortgage life and health policies on its borrowers. Sabo, a representative of the insurance company, called on the Bruckerts in November of 1962, and discussed the purchase of a policy with them. As a result, a group life insurance policy and a health policy were issued naming Clarence Bruckert as the insured, the premiums were charged to and paid by him for some 15 months after the issuance of the policy and it was in force at the time of his death. The actual certificates were prepared in the Savings and Loan Office. Its secretary testified that she had before her (1) the application, (2) supplemental information form and (3) loan and ledger card. The application was signed by Jennie J. Bruckert. The certificates were issued in the name of Clarence and delivered to him. The age stated as 47 was that of Jennie and the premiums were computed and paid on that age basis. The errors in the certificates were not discovered until after the death of Clarence.

When the policy was issued, Clarence was 56 or 57 and beyond the insurable age under insurance company policy.

Jennie testified that she wanted only health insurance, had no need for mortgage insurance and didn't buy mortgage insurance. The insurance representative testified that the application was made out for Jennie and not for Clarence and this was the Bruckerts' understanding. Based on the documentary evidence and these statements, the company now seeks a reformation of the policy on the theory that there was a mutual mistake of fact and equity should rectify it.

Plaintiff contends that reformation is barred by the incontestability provisions of the policy which makes it incontestable after one year except for non-payment of premiums. The authorities are otherwise. In 7 ALR/504, 2d at p. 505, it is stated:

> "According to the great majority of the cases the general rule is that, if there are grounds for the granting of the equitable remedy of reformation, a clause in the policy of insurance making the policy incontestable by the insurer after a stated period is unavailable as a defense or bar to such reformation."

This appears to be the rule in Illinois. In Metropolitan Life Insurance Company v. Henriksen, 6 Ill. App. 2d 127, 126 N.E. 2d 736, it is rather succinctly stated that a suit to reform a written instrument is not a suit to contest that instrument, but a prayer to make the instrument speak the real agreement between the parties. And so it is here.

Plaintiff further contends that defendant is attempting to alter the terms of a written contract by parole evidence and this cannot be done. The cross-complaint was a suit in equity and there is no doubt that parole evidence is admissible

in equity to show the real agreement between the parties where a mutual mistake has been made in the written contract and the evidence is for the purpose of making the contract conform to the original intention of the parties. Brosam v. Employer's Mutual Casualty Company, 61 Ill. App. 2d 183, 209 N.E. 2d 350; Mahon v. State Farm Mutual Automobile Insurance Co., 36 Ill. App. 2d 368, 184 N.E. 2d 718. Brosam makes it equally clear that the evidence required to reform a written instrument must be clear, convincing and unequivocal. See also Spence v. Washington Nat. Ins. Co., 320 Ill. App. 149, 50 N.E. 2d 128. This brings us now to the evidence.

Plaintiff contends that the testimony of Sabo is incompetent under the Dead Man's Statute, Ill. Rev. Stat. 1965, ch. 51, § 2, as to the transactions and statements made when the application was taken. Sabo was production manager for the insurance company. Without passing on his initial competency, we are of the opinion that the testimony of Mrs. Bruckert on cross-examination lowered the bars in any event for his testimony under the third exception to the Dead Man's Statute. That exception is as follows:

> "Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction."

She testified as to her presence in the home at the time of the application, that the insurance was for her and not for her husband and that it was to be sickness insurance. As abstracted, she then testified:

> "At the time I signed the application I don't know one way or the other how much, if any of it, was filled out. I signed it in two places. At the bottom where it says "Jennie J. Bruckert, December 26, 1915" that is my handwriting and my birth date. I also signed it up above the line where it says signature of borrower to be insured. I did not discuss with Mr. Sabo as to what the insurance was.
>
> 'Q. Did you have a discussion with anybody as to what insurance you were making application for?
>
> A. No, I wanted income insurance.'
>
> I did not have any conversation with anybody about it nor discuss it with anyone. Nothing was said about how much this was going to cost. The amount was to be added on to the mortgage payments."

This testimony relates to the time, place and transaction from which the policies in question sprung. In our judgment, such testimony effectively opened the gate to the testimony of Sabo and the trial court erred in striking his testimony in its entirety.

We now turn to the question whether the evidence in this record is clear, convincing and unequivocal as to the intended contract between the parties. We think it is clear that no contract with Clarence was ever intended. There is no application or evidence that Clarence ever applied for mortgage loan insurance. Sabo testified that he did not.

The application for the insurance was signed by Jennie. Her age was stated on it as well as her birth date. Premiums were computed and paid on her age. The secretary of the building and loan company testified that "Exhibits 6 and 7 have the name Jennie Bruckert typed in and then the Jennie and the initial are crossed out and in ink is put Clarence K. I did it.... I typed in the man's name because that's why [sic] I have always typed them in whenever I worked there.... When I typed this instrument [the certificate] I had the application for loan and the supplemental form. I didn't have anything with Clarence Bruckert's name on it." It seems clear that it is here that the error occurred. No certificate was issued to Jennie. The record of Jennie was the one screened by the insurance company. The vice-president of the company so testified. At the time the certificate was inadvertently issued to Clarence, the company was not issuing group mortgage insurance to persons over 53. Clarence was 56 or 57. Sabo testified that "I told her that Clarence was over age and I suggested that she apply for coverage. With reference to taking out the insurance she said 'Clarence, if you think it's the thing to do' and she went ahead and signed the application. Clarence said he thought it would be a good thing and she ought to apply for it both parts." There is no denial of this testimony in this record. Except for the inadvertent issuance of the certificate in Clarence's name, all would have been well. It was inadvertently done by the secretary of the building and loan association and was intended by nobody. The

suggestion that Clarence might have signed an application before Jennie came into the room is pure speculation unsupported by any evidence in this record. The evidence is clear, convincing and unequivocal that no one expected Clarence to be the insured. Ignoring Jennie's application in toto, it is clear from this record that she now says she wanted only health insurance. How this can be now blown up into valid health and mortgage insurance for Clarence escapes us. The two contracts delivered to the Bruckerts expresses the intention of no one.

It is urged that the mistake was unilateral on the part of the insurance company and that neither Jennie nor Clarence made any mistake of fact. The physical act of issuing the policy in the wrong name was unilateral - as it generally is. The mutual mistake of fact was the agreement itself. The insurance company thought they were to insure Jennie - Jennie thinks she was only to receive health insurance. The minds of the parties did not meet. Even if it be said that there is no basis for reforming the mortgage insurance, there is still a sound basis for reforming the health insurance. The cross-complaint seeks that also. In our judgment, it is only the health contract that can be properly reformed.

Accordingly, this cause is reversed and remanded to the trial court to (a) enter judgment against the administrator and in favor of the defendant insurance company on the

original complaint, (b) to adhere to its original judgment in favor of the building and loan association, (c) to reform the health certificate to name Jennie as beneficiary, and (d) to compute the premiums erroneously paid on the mortgage insurance and enter judgment in favor of the administrator and against the insurance company for this amount. It is further ordered that each party bear his or its own costs.

Reversed and remanded with directions.

Craven, P.J. and Trapp, J., concur.

NO. 65-144

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT KASKE and JOHN KASKE, a minor, by his parent and next friend, Robert Kaske,	)	
Plaintiffs-Appellants,	)	Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois.
vs.	)	
SCHOOL DISTRICT NO. 112, WINNEBAGO COUNTY, ILLINOIS AND CHESTER LLOYD BLOOM,	)	
Defendants-Appellees.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This action was brought by Robert Kaske and John Kaske, a minor, by his parent and next friend, Robert Kaske, for injuries suffered by John Kaske as a result of the alleged negligence of the defendant School District No. 112, Winnebago County, and its teacher and agent, Chester Lloyd Bloom. A previous trial of the cause ended in a hung jury on February 26, 1964. On the second trial, the jury returned a verdict of not guilty for both defendants and judgment was entered accordingly. Post trial motions for judgment notwithstanding the verdict and for a new trial were denied and this appeal results.

On September 28, 1962, John Kaske, then age 12 years, was a student in the seventh grade class of the Cherry Valley Elementary School, School District No. 112, Winnebago County. John was one of 24 or 26 students under the supervision of Chester Lloyd Bloom in a second floor classroom in the northwest corner of the school building. Bloom, aged 42, was a new teacher in the District and had been hired only three weeks earlier.

The classroom was approximately 30 feet long and 30 feet wide. Bloom's desk was at the north end of the room with the desks of the students placed in rows from east to west before it. The only door to the room was on the east wall in the south corner and the only windows on the west. North of the doorway, an alcove was located in the east wall. A table, approximately six feet long and three feet wide, was placed in the alcove, its rear edge against the east wall and its south edge against the south wall of the alcove.

At approximately 9:45 A.M. on September 28, the class commenced a regular period of a course entitled General Science under the direction of Bloom. This course ordinarily involved the conduct of so-called "experiments" in which the class both participated and observed.

Two experiments were to be studied by the class. The first was placed on Bloom's desk at the north end of the room and involved a study of capillary action. A cloth was placed in the open mouth of a jar that contained colored water. The coloring was to rise throughout the cloth as a demonstration of osmosis.

The second experiment was to plate a wire with copper in a copper sulphate solution. For this purpose, alcohol burners were set on the

table in the alcove. Tripods were placed over the flames of the alcohol burners and the solution heated in beakers that rested on screens on the tripods. Bloom testified that he had filled the burners with alcohol from a quart-size can before classes began. He replaced the screw top cap on the can after the burners were filled and placed the can, that still contained about a pint of alcohol, on top of a wooden box at the rear of the table against the east wall of the alcove.

According to Bloom, about one-third of the class remained at their desks, another one-third was grouped at his desk to observe the osmosis demonstration, and the remainder of the class were at the table on the east wall to see the demonstrations conducted there. Bloom moved back and forth between the experiments to explain them to his students. As he returned to the group formed in a semi-circle at the table, he started to place his hands on the shoulders of two boys in the group. Suddenly there was an explosion and flames shot up over the boys' heads. Several of the students, including John Kaske, who were standing near the table, were set afire by the flames. John ran from the room in flames and suffered, as a result, extensive and painful injuries.

Both John Kaske and a fellow student, Dale Moyer, testified that Bloom filled the burners immediately before the experiment started, and that one of the burners did not operate. Bloom, according to them, then filled a shallow jar cover, similar to that used on peanut butter jars, with alcohol and ignited it. Kaske stated that Bloom handed the alcohol can to Earl Williams, a student, after he filled the cap and that he did not see Williams replace the cover on the alcohol can or what he did with the can itself. Moyer remembered that Bloom placed the alcohol can on a microscope kit that was

itself on the wooden box at the back of the table.

Bloom, Williams, and Larry Howe, another student, deny that a lamp was out of order or that Bloom filled and ignited alcohol in a jar cover. They also deny that Bloom filled the burners in the presence of the class. Williams recalled that only he and Howe used the burners that morning and that they had extinguished the flames about a minute before the explosion occurred. No one saw the alcohol can fall although Moyer stated that it was on the floor after the fire. Moyer and Kaske remember that the table was "wobbly" but none of the others do. The formal report of the school principal, made two days after the accident and introduced into evidence, indicated that one of the students had pushed against the table and that, as a result, the alcohol can had toppled from its perch, its cap fell off, and the fumes were ignited by one of the burners. However, there is no direct testimony to that effect in the record.

The appeal is brought on the plaintiffs' contentions that the court erred in not granting a new trial since the verdict of the jury was clearly against the manifest weight of the evidence. A court of review can determine that a verdict is against the manifest weight of the evidence and order a new trial if it appears from the record that an opposite conclusion was clearly evident or the jury's verdict palpably erroneous and wholly unwarranted. Vasic v. Chicago Transit Authority, 33 Ill. App. (2d) 11, 11e; Benkowsky v. Chicago Transit Authority, 28 Ill. App. (2d) 257. Where, as here, the trial court considered and rejected a motion for a new trial on the basis that the verdict was not against the manifest weight of the evidence, the court of review will also take into consideration the trial judge's

decision with the fact that he saw the witnesses, observed their conduct and was, with the jury, in a unique position to evaluate the evidence. Vasic v. Chicago Transit Authority, ibid.

The record before us on this appeal does not indicate that verdict of the jury was improper. The testimony of the witnesses as to what transpired at the table before the explosion was in direct conflict. The precise cause of the explosion remains a mystery. Bloom's conduct, unless one accepts the version of the events as related by John Kaske and Dale Moyer in its entirety, does not appear irregular. That the jury apparently did not accept their version is not surprising and was, in any event, properly left for their determination as triers of the facts.

Plaintiffs also urge that the court committed reversible error in that it permitted Bloom to testify as to the size of his family and his military service during World War II. The defense had justified the reference to Bloom's war experiences as a fighter pilot to establish his special knowledge as to fires in general. The justification is quite spurious and the testimony should clearly have not been permitted. However, Bloom's relation of these facts was brief and the point was not again brought to the attention of the jury. We do not feel that its inclusion, although improper, amounted to reversible error. A decision will not be reversed although error appears in the record unless that error has prejudiced the rights of a party. Reske v. Klein, 33 Ill. App. (2d) 302, 312.

Finally, it is contended that the defense counsel, in his closing argument, improperly informed the jury that Bloom had no insurance to

protect him against liability in the case. We have carefully read the closing argument and do not find any reference to insurance or that it was otherwise improper. The judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

MORAN, P. J. and SEIDENFELD, J. concur

177 I.A.2d 462

NO. 66-39

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In the Matter of the Estate of HENRY EDWARD WINANS, Deceased, LARRY RICHARD MANNS, Claimant (Plaintiff) Appellant, vs. ESTATE OF HENRY EDWARD WINANS, Deceased, HERMAN V. MEYER and CHARLES W. WIGHTMAN, Executors, Defendants-Appellees.	Appeal from the Circuit Court of Madison County Honorable Austin Lewis, Judge Presiding.

Goldenhersh, P. J.

Plaintiff, Larry Richard Manns, appeals from the judgment of the Circuit Court of Madison County, dismissing his claim against the Estate of Henry Edward Winans, deceased. On March 27, 1963, plaintiff filed a claim against the estate, of which defendants are the executors, seeking to recover payment for services allegedly performed for the deceased over a period of approximately 4½ years, commencing in 1958 and terminating with his death on June 17, 1962. The testimony shows that the deceased was 93 or 94 years of age at the time of his death, was able to care for himself, but for several years had been troubled with a senile cataract which affected his vision, and prevented his driving an automobile.

Plaintiff called 6 witnesses who testified that plaintiff took care of, and washed, the deceased's cars, regularly drove him to a super market, helped him shop, carried parcels, drove him to the bank, to his doctor's office, to a filling station, and frequently drove him to an automobile agency in Alton.

In addition to these witnesses, a chiropractor, an optometrist, a meat market operator, a service station operator, a checker in a super market, 2 bank employees and a pharmacist, testified that when the deceased came to their offices and places of business, he was almost always accompanied by plaintiff.

Mr. Transue, a neighbor of the deceased, testified that he saw plaintiff at the deceased's home "maybe 3 times a week", that plaintiff would drive him and the deceased to the grocery store about twice a week, and while he was in the hospital, plaintiff frequently brought the deceased to visit him.

Daniel Graham, a friend of plaintiff, testified that plaintiff worked as a chauffeur for the deceased and drove him regularly, and that plaintiff scheduled his classes at Southern Illinois University around his work periods for the deceased. Don Lyons testified that plaintiff drove the deceased, almost daily, that on occasion, when he and plaintiff had made arrangements to go out together, he waited until plaintiff finished working for the deceased.

Helen Critchlow, a daughter of the deceased, called by plaintiff, testified that on several occasions when she visited her father, plaintiff was there, that she believed plaintiff had been very kind and helpful to her father "in the capacity of an employee", that she felt that plaintiff was trying to "blackmail" the estate by filing a claim seeking payment for services for which he had already been paid. She identified, and admitted writing, a letter addressed to plaintiff, dated October 4, 1962, thanking him for the many kindnesses he had shown the deceased.

Albert Critchlow, husband of Helen, testified he had seen plaintiff drive the deceased in plaintiff's automobile.

Mrs. Lela Winans, widow of the deceased, testified that plaintiff sometimes drove the deceased to various places, and testified that plaintiff had driven her and the deceased on a trip to Michigan and Canada, and on several occasions had driven her to Auburn, Illinois.

Shirley Smith, wife of the deceased's stepson, testified that plaintiff had driven the deceased and Mrs. Winans to Minneapolis, where the witness then lived, and had picked her up at the airport when she came to Alton to attend the deceased's funeral.

Plaintiff's brother testified that plaintiff frequently drove the deceased, and plaintiff's mother testified that the deceased or someone in his household, frequently called plaintiff to come drive him to various places.

In defendants' case, Mrs. Winans, widow of the deceased, testified that she had seen her husband pay plaintiff many times, and that the payments were in cash.

A witness called by defendant, testified that plaintiff worked part-time in a grocery store which he managed, and that the deceased frequently came to the store, and on almost every occasion, was accompanied by plaintiff. This witness also testified that from May 1960 until May 1962, plaintiff worked in the store part-time, averaging 20 to 25 hours per week, at pay scales ranging from $1.52 per hour to $2.10 per hour. During this period, plaintiff was also attending classes at Southern Illinois University, but the record does not reflect how many classes he was required to attend at any given period.

Plaintiff, testifying on rebuttal, stated that he had agreed with the deceased that he would be paid $3.00 to $5.00 per hour

for his services during the trip to Michigan and Canada.

Plaintiff offered testimony, and an exhibit, as to the prevailing hourly rate of pay for chauffeurs in the Alton area, during the period when the services were allegedly performed.

The answer filed by defendants asserts that plaintiff was given credit for "all credits, deductions and set-offs" in a proceeding upon a note of plaintiff on which judgment was entered on March 1, 1963. A note was marked as an exhibit by defendant, but there is no testimony as to who executed it, and neither the note, nor any record of the entry of a judgment based thereon, is in evidence.

Plaintiff contends that the trial court erred in rejecting the uncontroverted testimony adduced by plaintiff, that the decision of the trial court is arbitrary, capricious, and against the manifest weight of the evidence.

Defendants argue that a claim for services to a decedent must rest on a contract, express or implied, that the claim must be proved by clear and convincing evidence, the trial court is not required to accept testimony, even when uncontradicted, unless it is clear and convincing, and the claim for services was properly denied.

It does not appear from the evidence that plaintiff was of kin to the deceased, and the rule applicable where no family relationship exists, is stated in Floyd v. Estate of Smith, 320 Ill. App. 171, wherein the court, at page 176, said: "Where no kin or family relationship exists between the parties, and one accepts and retains the beneficial results of another's services, which were rendered at his own insistence and request and which he had no reason to

suppose were gratuitous, the law will imply liability for such services in such an amount as they are reasonably worth."

Plaintiff contends that the court rejected the uncontroverted testimony of plaintiff's witnesses, and in so doing, violated the rule that when testimony is not inherently improbable, and stands uncontroverted, the trier of facts may not arbitrarily or capriciously ignore it. We have examined the cases cited by plaintiff in support of this argument and find that none of them involved claims against decedents' estates. The rule with regard to claims against the estates of deceased persons is that the evidence must be scrutinized with care, and not be permitted to prevail except upon clear proof. Floyd v. Estate of Smith, 320 Ill. App. 171.

The uncontroverted testimony, subjected to the careful scrutiny with which evidence in support of claims against the estates of decedents is to be examined, shows that plaintiff performed services for the deceased on a fairly regular basis, and drove the deceased and his wife on several one day trips to Auburn, Illinois, and on a trip of approximately 8 days' duration to the northern part of the United States, and into Canada. The defendants do not deny that such services were performed, and it is apparent from the testimony of Mrs. Critchlow and Mrs. Winans that plaintiff was considered to be an employee.

Under these circumstances, the burden of proof of payment rested upon the defendant executors. In re Estate of Pohn, 67 Ill. App. 2d 227. The only evidence adduced by defendants to sustain this burden of proof is the statement of Mrs. Critchlow that the plaintiff, in filing the claim, sought payment for services for which he had already been paid, and the testimony of Mrs. Winans that she had seen

her husband pay plaintiff many times, and the payments were in cash.

In our opinion, this evidence is insufficient to sustain the burden of proof of payment, and in the absence of satisfactory proof of payment, plaintiff is entitled to recover the reasonable value of the services shown to have been performed, and for which he was not paid.

In cases heard by the court, an appellate tribunal should not disturb the findings of the trial court, unless they are against the manifest weight of the evidence, and unless an opposite conclusion is clearly evident. In re Estate of Heyder v. Toms, 62 Ill. App. 2d 318. Upon careful review of the evidence, we conclude that it is clearly evident that plaintiff performed services for which he is entitled to reasonable compensation, and defendants have failed to sustain the burden of proof of payment.

For the reasons herein set forth, the judgment of the Circuit Court of Madison County is reversed, and the cause remanded, with directions to reconsider the evidence heard to date, and hear such further evidence as the parties desire to adduce. Neither party is precluded from offering additional evidence of the value of plaintiff's services, or additional evidence of payment, or non-payment.

Judgment reversed and cause remanded with directions, and on issues as limited by this opinion.

Concur: George J. Moran

Concur: Edward C. Eberspacher

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